Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-922

In the Supreme Court of the United States

OCTOBER TERM, 1985

INEXCO OIL COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

THEODORE A. MILES
Principal Deputy Solicitor

CHARLES L. COPE II
RODNEY L. SOLENBERGER
Assistant Solicitors
Economic Regulatory Administration
Department of Energy
Washington, D.C. 20585

TABLE OF AUTHORITIES

Page

Cases:

Atlantic Richfield Co. v. *DOE*, 769 F.2d 771 5

Bray v. *United States*, 423 U.S. 73 ..... 4, 5

Camp v. *Pitts*, 411 U.S. 138 7

DOE v. *Brett*, 659 F.2d 154, cert. denied, 456 U.S. 936 4

DOE v. *Crocker*, 629 F.2d 1341 4

DOE v. *Osborn*, 760 F.2d 282 6

Grigsby v. *DOE*, 585 F.2d 1069, cert. denied, 440 U.S. 508 6

Mountain Fuel Supply Co. v. *DOE*, 656 F.2d 690 6

Pennzoil Co. v. *DOE*, 680 F.2d 156, cert. dismissed, 459 U.S. 1190 1

Texaco, Inc. v. *DOE*, 616 F.2d 1193 5

United States v. *Carlo Bianchi & Co.*, 373 U.S. 709 7

United States v. *Texas Energy Petroleum Corp.*, 719 F.2d 394 5

United States v. *Uni Oil, Inc.*, 646 F.2d 946, cert. denied, 455 U.S. 908 5

United States v. *Zang*, 645 F.2d 999, cert. denied, 454 U.S. 864 5

Page

Statutes and regulation:

Department of Energy Organization Act, Tit. V, 42 U.S.C. 7191 *et seq.* :

§ 502, 42 U.S.C. 7192 5
§ 503, 42 U.S.C. 7193 5

Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note 3

§ 211(d)(1), 12 U.S.C. (1976 ed.) 1904 note 7

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (1976 ed.) 751 *et seq.* 3

§ 5(a)(1), 15 U.S.C. (1976 ed.) 754(a)(1) 7

Freedom of Information Act, 5 U.S.C. 552 5

18 U.S.C. 401 4

18 U.S.C. 1001 5

18 U.S.C. 1341 5

18 U.S.C. 1343 5

18 U.S.C. 1962 5

10 C.F.R. 212.73(b) 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-922

INEXCO OIL COMPANY, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner challenges the decision of the Temporary Emergency Court of Appeals, which issued a writ of mandamus directing the district court to vacate a document production order. Petitioner contends that the court of appeals lacked jurisdiction to issue the writ of mandamus and misapplied the doctrine of res judicata by ruling that three prior decisions approving the Department of Energy's interpretation of a regulation barred petitioner from challenging that interpretation.

1. In 1979, the Department of Energy (DOE)[1] issued a Proposed Remedial Order requiring petitioner to make

---

[1]We use the term DOE to refer to the Department of Energy as well as to its predecessor agencies. The various agencies are set forth in *Pennzoil Co. v. DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

restitution of nearly $100,000 plus interest for overcharges resulting from crude oil sales in violation of the then-effective price regulations. Pet. App. A2. Petitioner challenged the Proposed Remedial Order before DOE's adjudicatory arm, the Office of Hearings and Appeals (OHA), and sought discovery of internal DOE documents construing the regulatory term "posted price" (see 10 C.F.R. 212.73(b) (1974)), which OHA denied as irrelevant. Pet. App. A2-A3. After OHA adopted the Proposed Remedial Order as a Remedial Order, petitioner appealed to the Federal Energy Regulatory Commission (FERC). Petitioner initially declined to request discovery in that proceeding, but subsequently moved to discover documents similar to those sought in the prior proceeding. FERC denied petitioner's motion on the ground that it was untimely, and, after further briefing and argument, FERC affirmed the Remedial Order. *Id.* at A3.

Petitioner then sought review in the United States District Court for the District of Wyoming challenging, inter alia, the agency's interpretation of the regulatory term "posted price," upon which the Remedial Order is based. Pet. App. A3. Petitioner sought to discover internal DOE documents discussing or applying the "posted price" term. The magistrate ordered DOE to produce all the requested documents and denied DOE's motion for a protective order. *Ibid.* In response, the agency produced 165 documents and withheld 63 documents subject to the predecisional, deliberative process privilege. The magistrate granted petitioner's motion for an order compelling discovery of the withheld documents. *Ibid.*

DOE appealed the magistrate's order to the district court, which reviewed the disputed documents in camera and ordered DOE to produce all of the documents (Pet. App. A3-A4). The court ruled that several documents should have been included in the administrative record, that the

deliberative process privilege did not apply to any of the remaining documents, and that, even if the privilege was applicable, petitioner's need for the documents to challenge the agency's construction and application of its regulations outweighed the government's interest in non-disclosure (*id.* at A4, B21). DOE sought a stay of the order and a writ of mandamus from the Temporary Emergency Court of Appeals. The court of appeals granted a stay pending disposition of the petition for writ of mandamus. *Ibid.*

On October 2, 1985, the court of appeals issued a writ of mandamus ordering the district court to vacate its order compelling production of the disputed documents (Pet. App. A1-A9). The court first held that it had jurisdiction to adjudicate the issues presented by the petition, on the ground that the district court's ruling that the sought-after documents were relevant raised an issue under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. (1976 ed.) 751 *et seq.* (Pet. App. A4-A6). On the merits, the court held that the documents were irrelevant to any issue before the district court and that mandamus was the appropriate remedy in this case (*id.* at A7-A9).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals, and presents no significant legal issue. Accordingly, review by this Court is not warranted.

a. Petitioner argues (Pet. 5-12) that the court of appeals lacked jurisdiction to entertain the DOE's mandamus petition. That claim is insubstantial. The limited jurisdiction of the Temporary Emergency Court of Appeals extends only to the resolution of issues arising under the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. (1976 ed.) 751 *et seq.*, and the regulations promulgated under these statutes. The underlying

action between petitioner and DOE challenges a DOE remedial order over which the Temporary Emergency Court of Appeals clearly has exclusive appellate jurisdiction. That court has repeatedly held that its jurisdiction to review such issues necessarily includes review of district court discovery orders that compel disclosure of privileged information related to ESA and EPAA claims. See, *e.g.*, *DOE* v. *Brett*, 659 F.2d 154 (Temp. Emer. Ct. App. 1981), cert. denied, 456 U.S. 936 (1982). As the court explained (Pet. App. A4-A5), a district court's ruling that certain evidence is relevant to DOE's construction of the EPAA "necessarily involves an adjudication of an EPAA issue." See, *e.g.*, *DOE* v. *Crocker*, 629 F.2d 1341, 1344 (Temp. Emer. Ct. App. 1980). Accordingly, the district court's ruling (Pet. App. B21, C2) that petitioner needed the privileged documents to support its challenge to the validity and consistency of DOE's interpretation of its EPAA regulations presented an issue over which the court of appeals had jurisdiction. *Id.* at A5.

Petitioner's reliance (Pet. 5-8) on *Bray* v. *United States*, 423 U.S. 73 (1975), is misplaced. There, a party refused to comply with a subpoena requiring the production of documents necessary for an investigation into possible violations of the ESA, and the government initiated criminal contempt proceedings under 18 U.S.C. 401. This Court held that the Temporary Emergency Court of Appeals lacked jurisdiction over an appeal from that party's contempt conviction, on the ground that the defendant's "refusal to obey a lawful order * * * initiated 'a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court' and was 'not a part of the original cause' " (423 U.S. at 75 (citations omitted)). Here, by contrast, no "separate and independent proceeding" was

commenced, nor did DOE "seek review of a criminal conviction" (Pet. App. A6). *Bray* therefore has no bearing on this case.[2]

Indeed, any other result would make no sense. For example, if DOE had refused to produce the privileged documents and the district court granted judgment for petitioner as a sanction, the Temporary Emergency Court of Appeals unquestionably would have exclusive appellate jurisdiction over an appeal from that judgment. By the same

---

[2]Petitioner errs in claiming (Pet. 11) that the discovery order turns entirely upon an application of the deliberative process privilege without regard to the issues raised in the underlying action. In the first place, the court of appeals held that the documents were irrelevant and did not address the privilege issue petitioner raises in this Court (Pet. App. A8-A9). Moreover, the disclosure order was based on the district court's finding that petitioner needed the documents to establish a defense to DOE's remedial order, which is premised on an EPAA regulation. Pet. App. B21, C2.

Nor does the ruling here conflict with any of the decisions cited by petitioner (Pet. 8, 10). Each of those cases involved statutes other than the EPAA and raised no issue under that statute (or the ESA). See *Atlantic Richfield Co.* v. *DOE*, 769 F.2d 771, 778-780 (D.C. Cir. 1984) (review of the scope of Secretary of Energy's authority pursuant to Section 503 of the Department of Energy Organization Act, 42 U.S.C. 7193); *United States* v. *Texas Energy Petroleum Corp.*, 719 F.2d 394, 398 (Temp. Emer. Ct. App. 1983) (severable counterclaim filed pursuant to the Freedom of Information Act, 5 U.S.C. 552); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 949-952 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982) (criminal prosecution for violations of 18 U.S.C. 1001, 1341, 1343 and 1962); *Texaco, Inc.* v. *DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979) (adjudication of administrative action arising under Section 502 of the Department of Energy Organization Act, 42 U.S.C. 7192).

Finally, petitioner's speculation (Pet. 11) that the court's decision is "potentially insidious" because it allows a defendant in a criminal case to vest jurisdiction in the Temporary Emergency Court of Appeals by seeking interlocutory mandamus review is belied by that court's own decisions. See, *e.g.*, *United States* v. *Zang*, 645 F.2d 999, cert. denied, 454 U.S. 864 (1981).

token, if the district court had denied petitioner's discovery request and entered judgment for DOE, petitioner's appeal would lie only in the Temporary Emergency Court of Appeals. Yet both appeals would raise precisely the same discovery issue presented here. Therefore, it is under petitioner's argument that "appellate jurisdiction * * * will turn on the procedural vehicle chosen to obtain review" (Pet. 11).

b. The court of appeals also properly exercised its authority in issuing a writ of mandamus. The Temporary Emergency Court of Appeals would have exclusive jurisdiction over an appeal by DOE from a judgment in petitioner's favor holding that DOE's construction of its regulations was irrational. However, given the court of appeals' three prior decisions to the contrary,[3] mandamus was an appropriate means of enforcing the court's prior rulings, which make the documents petitioner sought irrelevant as a matter of law.

Petitioner errs in contending (Pet. 12-15) that the court of appeals relied on its prior decisions to foreclose petitioner's suit in this case. The decision below does not prevent petitioner from arguing that DOE's actions were not supported by substantial evidence or that the agency improperly applied its regulations in petitioner's case. The court of appeals simply held, on the strength of its prior rulings, that the documents petitioner sought were irrelevant because the agency's construction of its regulations was valid. That is a legal issue as to which discovery is irrelevant.

Additionally, because all of these documents are predecisional and since none is in the administrative record, which petitioner in part compiled, they may not be considered by

---

[3]See *DOE* v. *Osborn*, 760 F.2d 282 (1984); *Mountain Fuel Supply Co.* v. *DOE*, 656 F.2d 690 (1981); *Grigsby* v. *DOE*, 585 F.2d 1069 (1978), cert. denied, 440 U.S. 508 (1979).

the district court. See *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) ("the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (emphasis deleted) ("[the 'substantial evidence'] standard goes to the reasonableness of what the agency did on the basis of the evidence before it").[4] The court of appeals' decision simply requires the district court to resolve petitioner's claims on the basis of the administrative record. Petitioner's discussion of the doctrine of res judicata is therefore wholly beside the point.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

THEODORE A. MILES
Principal Deputy Solicitor

CHARLES L. COPE II
RODNEY L. SOLENBERGER
Assistant Solicitors
Economic Regulatory Administration
Department of Energy

FEBRUARY 1986

---

[4]ESA Section 211(d)(1), 12 U.S.C. (1976 ed.) 1904 note, which is incorporated by reference by EPAA Section 5(a)(1), 15 U.S.C. (1976 ed.) 754(a)(1), provides in relevant part:

> [N]o order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.